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Beware the Probationary Employment Period

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Many private employers have provisions in their employee handbooks or offer letters providing that new employees will be subject to a so-called probationary period. Though the length of the probationary period may vary from employer to employer, the general idea is that, during a certain delineated initial period of employment, the employee is in a trial period during which he or she is being examined to see if the employer wants to keep the employee on as a "regular" — or as some employers unfortunately call it, a "permanent" employee. If the new employee either performs his or her job duties unsatisfactorily or does not turn out to be a "good fit," the employer either will terminate him or her at the end of the probationary period or, in some cases, extend the probationary period. Employers often labor under the misconception that they can discipline or terminate a probationary employee with no legal risk. This, however, is not the case.

Probationary Status Alone Is Not the Answer

Probationary periods are not the panacea that many private employers think they are. Unlike in the public sector where probationary status limits an employee's ability to contest her termination, in the private sector, probationary employees have the same rights under applicable law as any other employee, and can bring the same type of legal claims as a regular employee. In other words, terminating a probationary employee in the private sector presents the exact same legal risk as terminating any other at-will employee. As one judge put it, "[u]nder the common law principles of at-will employment, an employer is free to terminate a 32-year employee — just as it is free to terminate a probationary employee with just a few months under his belt — for good reason, bad reason or no reason at all." *Bellas v. CBS, Inc.*, 211 F.3rd 517 (3rd Cir. 2000).

That being said, a probationary period, if designed and administered properly, can provide some modest advantages for employers. Probationary periods have the most bang for their buck in the private sector in a union environment. Typically, employers will negotiate a term in the collective bargaining agreement, which provides that the union cannot file a grievance under the labor contract if a probationary employee is either disciplined or terminated. Thus, the employer does not have the potential expense of an arbitration proceeding with the union when it decides to discipline or terminate a probationary employee. However, even in such cases, although the probationary employee has no recourse under the terms of the collective bargaining agreement in the event of termination, he or she can file a lawsuit in court alleging illegal discrimination.

In addition, an employer can draft its code of conduct or certain policies with an eye toward providing more liberal grounds for terminating employees during the probationary period. For example, an employer could have an attendance policy stating that regular employees may be terminated after more than four unexcused absences per quarter; however,

probationary employees may not have any unexcused absences. Thus, even one unexcused absence would be grounds for terminating a probationary employee.

The Importance of Drafting And Implementing

Such policies, however, are only effective if drafted and implemented properly. Significant problems can arise from policies if they are not drafted or implemented correctly. For example, the employer in *Rohloff v. Metz Baking Co.*¸ 491 F. Supp.2d 840 (N.D.Iowa 2007), had an attendance policy which provided that if a probationary employee had four unexcused absences during the probationary period, he or she could be terminated. Metz fired Rohloff, a probationary employee, at the end of her probationary period because she had accrued four unexcused absences. Rohloff sued Metz, asserting that she had really been terminated because Metz had learned she was pregnant.

Metz moved for summary judgment, arguing that it had a legitimate non-discriminatory reason for terminating Rohloff: Pursuant to its attendance policy, if a probationary employee had four unexcused absences during her probationary period, it was grounds for termination. In addition, Metz argued that the collective bargaining agreement between Metz and the union representing Rohloff gave Metz sole discretion to decide whether or not to retain a probationary employee, such as Rohloff. However, the court denied Metz's motion. Although the court found that Metz had articulated a legitimate non-discriminatory reason for Rohloff's termination, it held there was a genuine issue of material fact as to whether or not the stated reason for Rohloff's termination was a pretext for pregnancy discrimination. The court articulated the issues: 1) Metz's written attendance policy merely said that four unexcused absences were grounds for "consultation" with the probationary employee, not termination; 2) at the time of Rohloff's 30-day review, she had already racked up three absences and was not specifically warned in the evaluation that she could be terminated; and 3) the supervisor had testified in his deposition that he was unaware of a "specific rule" about absences during the probationary period. Thus, in this case, because it was not drafted and implemented in a careful manner, the policy did not provide the intended level of protection from risk.

Non-Union Employers

Outside the union environment, employers have policies that draw a distinction between probationary and regular employees for purposes of progressive discipline. Though they vary in detail, the general thrust of such policies is that progressive discipline is used for regular employees, except in cases that provide grounds for immediate discharge, and that progressive discipline will not be used when disciplining or terminating probationary employees. However, these policies can get employers into trouble by implying that something other than an at-will employment relationship exists for regular employees.

For example, there is a line of cases in the District of Columbia in which courts have held that employers had transformed an at-will employment relationship into an implied contractual relationship that limited the employer's right to discharge employees by drawing such a distinction between probationary and regular employees. *See e.g., Sisco v. GSA Nat'l Capitol Federal Credit Union*, 689 A.2d 52 (D.C. 1997); *Martin v. Arc of the District of Columbia*, 541 F. Supp.2d 77 (D.D.C. 2008); and *United States v. Yesudian*, 153 F.3d 731 (D.C. Cir. 1998).

In *Sisco*, the plaintiff — who was a regular and not a probationary employee — argued that the employer had breached its contractual duties to her by not complying with the specific

conditions for discipline and discharge set forth in the employer's policy manual. The manual stated that, during the probationary period, "an employee may be dismissed without recourse." For regular employees, the manual contained a list of several grounds for immediate discharge, as well as a "guide to progressive discipline" that provided for such discipline to be followed in 29 enumerated "causes for progressive discipline." In determining whether or not the handbook created a contract between Sisco and her employer, the court considered the employer's argument that the handbook was not a contract because it referred to itself only as a "guide" and, in addition, the manual stated that these two lists that enumerated offenses for which employees could be disciplined and discharged were not all-inclusive and did not "exclude the credit union's right to discipline or discharge employees for any other cause." The *Sisco* court concluded, however, that these provisions overcame the presumption of at-will employment and created a contractual agreement that restricted Sisco's right to discharge employees. In addition to such policies, a probationary period can be useful to employers as a threshold for conferring benefits. Rather than incurring the cost of providing benefits on the first day of employment for an employee who may or may not work out, some employers make an employee's ability to participate in employee benefit plans or accrue vacation contingent upon the successful completion of a probationary period, consistent with the terms of their employee benefit plans and subject to applicable law. However, having a probationary period, per se, is not necessary to accomplish this goal. The employer can simply establish a threshold for benefits eligibility without reference to a probationary period.

Conclusion

In general, probationary periods instill employers with a false sense of security when making decisions about terminating probationary employees. Given that probationary employees have the same right to bring claims against an employer upon termination as regular employees, there is no principled reason for believing employers bear less risk when terminating probationary employees. Employers can implement policies that may help, in a small way, to allow them more liberality in terminating probationary employees. However, unless such policies are drafted and implemented correctly, they may not serve to minimize risk and could in fact, create additional risk.

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